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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FACEBOOK, INC. Plaintiff, v. CONNECTU LLC, et al. Defendants.	Case No. C 07-01389 RS **ORDER DENYING DEFENDANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION**

I.. INTRODUCTION

The question raised by this motion to dismiss is whether or not this Court may exercise personal jurisdiction over defendants Pacific Northwest Software ("PNS) and Winston Williams, both residents of the state of Washington. Since *Calder v. Jones*, 465 U.S. 783 (1984), courts have frequently exercised personal jurisdiction over non-resident defendants where those defendants are alleged to have intentionally engaged in conduct expressly aimed at a forum resident that causes harm in that forum. Generally in these cases defendants indisputably knew at the time of their conduct that the targeted persons or entities were located in the particular forum that subsequently asserted jurisdiction. In analyzing the jurisdictional question, therefore, the decisions typically include language referring to the defendants' knowledge of the plaintiffs' presence in the forum.

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As the California Supreme Court has observed, however, "the so-called Internet revolution has spawned a host of new legal issues as courts have struggled to apply traditional legal frameworks to this new communication medium."[1] This case presents such a new issue. Specifically, the Internet permits a person to carry out conduct expressly aimed at a specific person or entity in another forum that causes harm in that forum without having express knowledge as to the geographical location of the person or entity being affected. This phenomena has no readily apparent direct analog in the pre-Internet world. The first task presented, therefore, is to ascertain the holding of governing case law that arose at a time or in a context where the act of targeting a forum automatically carried with it knowledge of the geographical location, e.g, the sending of an actionable letter to a plaintiff at a mailing address. In other words, while the defendant in such a case necessarily knew where the targeted plaintiff was located by virtue of having addressed the letter, does reference to such a fact in the opinion imply that a defendant must always know that geographical fact before the affected forum may exercise jurisdiction?

Reconciling "traditional notions of fair play and substantial justice" that underlie all jurisdictional analysis with the established tests for personal jurisdiction under *Calder* and its progeny, the Court finds that a defendant need not have knowledge as to *which* geographic forum the plaintiff resides in, so long as the conduct was aimed at and likely to cause harm in that forum. On the particular facts here, therefore, the Court finds that the exercise of personal jurisdiction over PNS and Williams is appropriate. Accordingly, the motion to dismiss will be denied.

II. BACKGROUND[2]

Plaintiff Facebook operates a social network website. Although it apparently started operations outside California in February of 2004, by June of that year its operations were relocated to Silicon Valley, and it was first incorporated in California. The website has been hosted on California servers since August of 2004. Its principal place of business at all times since at least

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[1] *Pavlovich v. Superior Court*, 29 Cal.4th 262, 266 (1992).

[2] Additional factual background describing this action may be found in prior court orders, and will not be repeated here.

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February of 2005 has been located in Palo Alto, California. Defendant PNS is incorporated in Washington, and maintains its principal place of business in that state. Defendant Williams is also a Washington resident.

1. Facts related to General Jurisdiction

Facebook asserts that PNS has hired California residents Keith Benedict, an independent contractor, and Greg Deacon, along with his California staff, to perform work for it. PNS also has at least eleven customers who are located in California, accounting for approximately $595,277 – or about 7.5 percent – of the $8,000,000 in revenue that PNS has accumulated since its inception. PNS responds that the vast bulk of its clientele are based outside California, and that the few clients located in California are not "major" clients, and do not generate "significant" revenue for PNS.

Facebook also contends PNS has a business relationship with The Records Portal Company, a California corporation, that includes: 1) PNS having been designated as Records Portal's "engineering department" and exclusive software developer, 2) PNS serving as administrative contact for Records Portal's domain registration, and 3) PNS partner Mike Hayner acting as a member of Record Portal's management team. Facebook further alleges that PNS secured a 10 percent ownership interest in Records Portal in 2005. PNS responds that the available evidence only demonstrates that PNS *may* have a 10 percent ownership interest in Records Portal, and that Facebook has not met its burden of proving that Records Portal performs any business on behalf of PNS. Facebook further alleges that PNS has entered into at least one contract with both Google and craigslist.com, both of which are California companies, and that by agreeing to the terms of CraigsList's contract, PNS entered into an agreement that is governed by California law.

2. Facts related to Specific Jurisdiction

Facebook contends that ConnectU hired PNS in late 2004 and early 2005 to develop certain programs in order to expand the ConnectU platform. One program was the "Importer,"[3] which was allegedly used to gain unauthorized access to Facebook, by logging into Facebook using borrowed

[3] Facebook acknowledges that Importer was designed for use on other social networking sites, namely San Francisco based Friendster and Hi5 and Los Angeles-based MySpace.com, but alleges that PNS and Williams tailored some aspects of the software specifically for Facebook.

or falsified login information, and then importing profile and email account information from a registered user, "grabbing" email addresses from the friends listed on that user's profile, and adding those email addresses to ConnectU's database. Facebook claims that PNS also created and employed the "Social Butterfly" program to send unsolicited emails to the users whose email addresses had been acquired, inviting them to join ConnectU. The email invitations were allegedly sent by ConnectU's webmaster, and used misleading header and sender information to create the impression that the email was sent by the recipients' friends.

Facebook alleges that PNS and Williams specifically designed the Importer to operate in a manner that would avoid detection by Facebook. Notwithstanding those efforts, Facebook implemented certain protective features in response to ConnectU and PNS's activities. Facebook contends that Williams was pivotal in modifying the software to circumvent those security measures.

Finally, Facebook alleges that the Importer was used on the Facebook accounts of students enrolled in California schools, including Stanford, UCLA, and Claremont-McKenna College. Although Facebook places its reliance primarily on the argument that defendants' conduct was directed at, and caused harm to, *Facebook* in California, it points to the effects on these additional California residents to buttress further its contention that jurisdiction is proper here.

III. LEGAL STANDARDS

When there is no applicable federal statute governing personal jurisdiction, the law of the state in which the district court is located applies. California's long-arm statute, Cal.Code Civil Procedure § 410.10, permits the exercise of jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." *Rocke v. Canadian Automobile Sport Club*, 660 F.2d 395, 398 (9th Cir.1981). Accordingly, the exercise of jurisdiction must comport with due process. A defendant who is not present in the forum may be subject to jurisdiction only when he has certain minimum contacts with the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326

U.S. 310, 316 (1945). In judging minimum contacts, a court properly focuses on "the relationship among the defendant, the forum, and the litigation." *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). The Supreme Court has held that a non-resident's allegedly intentional and tortious acts expressly aimed at a California resident are sufficient to trigger jurisdiction over that non-resident. *Calder v. Jones*, *supra*, 465 U.S. at 789-90.

The party seeking to invoke the jurisdiction of the federal court shoulders the burden of establishing that such jurisdiction exists. *Data Disc, Inc. v. Systems Technology Assoc.*, 557 F.2d 1280, 1285 (9th Cir.1977). Personal jurisdiction may arise from general jurisdiction or specific jurisdiction. In order to establish general jurisdiction over the defendant, the defendant's activities within the forum state need to be "continuous and systematic" or "substantial" such that the state is considered to have a sufficient relationship with the defendant. *Lake v. Lake*, 817 F.2d 1416, 1420 (9th Cir.1987). The standard for establishing general jurisdiction is high, and requires that the defendant's contacts with the forum state "approximate physical presence." *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1169 (9th Cir. 2006) (citing *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000)).

In the absence of such continuous or substantial activity, specific jurisdiction may be invoked if there is a relationship between the quality of the defendant's forum contacts and the particular claims for relief advanced by plaintiff. *Hirsch v. Blue Cross, Blue Shield of Kansas City*, 800 F.2d 1474, 1477 (9th Cir.1986). The Ninth Circuit has set forth a three-part analysis to determine whether specific jurisdiction may attach to a claim arising out of a defendant's forum-related activities. First, the non-resident defendant must perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws. Second, the claim must be one that arises out of defendant's forum-related activities. Third, exercise of jurisdiction must be reasonable. *Gray & Co. v. Firstenberg Mach. Co., Inc.*, 913 F.2d 758, 760 (9th Cir.1990). In cases involving intentional conduct, the "purposeful availment" prong can be satisfied by meeting the "effects test," which requires: "(1) intentional actions; (2) expressly aimed at the forum state; (3) causing harm, the brunt of which is suffered - and which the defendant knows is likely to be suffered - in the forum state." *See Calder v. Jones*, 465 U.S. 783 (1984).

IV. DISCUSSION

A. General Jurisdiction

Facebook makes no claim that general jurisdiction exists in this forum over Williams, but does argue that PNS has sufficient contacts in California to give rise to such jurisdiction. The Ninth Circuit has held that when determining whether a court's exercise of general jurisdiction over a defendant is appropriate, "[f]actors to be taken into consideration are whether the defendant makes sales, solicits or engages in business in the state, serves the state's markets, designates an agent for service of process, holds a license, or is incorporated there." *Bancroft*, 223 F.3d at 1086. These factors, however, are merely guidelines, and a court should "focus upon the 'economic reality' of the defendants' activities rather than a mechanical checklist." *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1331 (9th Cir.1984).

Facebook has pointed to a variety of business activities in or related to California undertaken by PNS. First, Facebook asserts PNS has hired multiple independent contractors located in California to perform work for it, and that the broad discretion and responsibility granted to those contractors amounts to the existence of several "virtual" PNS offices which are centered in California. The evidence, however, shows at most sporadic and limited use of such "independent contractors" in this state. Similarly, the parties dispute how the percentage of revenues PNS has derived from California sources should be quantified or characterized, but it is apparent that it is well below a threshold that would give rise to a serious potential basis for general jurisdiction.

Next, Facebook argues that PNS advertises through California-based companies, Google and CraigsList, and that in so doing PNS has necessarily entered into contracts that are governed by California law. However, the choice of law provisions included in any such contracts would only apply to disputes arising from those agreements. *See Ting v. Orbit Commun. Co.*, No. 95-55838, 1997 WL 8470, *2, 1997 U.S.App. LEXIS 389, at *5-6 (9th Cir. Jan. 7, 1997) (finding that defendant's "inclusion of California choice of forum and choice of law clauses in its contracts does not warrant a finding of general jurisdiction"); *see also Gates Learjet Corp.* at 1331 ("choice of forum provision in the airplane purchase agreement applies only to disputes arising out of those agreements" and thus does not support a finding of general jurisdiction). As a result, the choice of law provisions that govern PNS' relationship with third-parties do not warrant a finding of general jurisdiction.

Finally, Facebook points to PNS's business relationship with, and possible ownership interest in, Records Portal, but again has failed to show anything beyond some business dealings that may be *relevant* to possible jurisdiction, but are insufficient to support it. Concededly, the analysis cannot turn on each alleged contact taken separately, but on all of the contacts taken as a whole. Nevertheless, Facebook simply has not met the high burden of demonstrating that PNS's activities "approximate physical presence" in California. As a result, the exercise of general jurisdiction over PNS is not warranted.

B. Specific Jurisdiction

1. *Purposeful Availment*

As noted above, the "purposeful availment" prong of the test for specific jurisdiction can be satisfied under the so-called "effects test" established by the Supreme Court in *Calder*. The Ninth Circuit has observed that courts have "struggled somewhat" in discerning the meaning and limits of *Calder*, because "the case cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction." *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000). Rather, the *Bancroft* court recognized that the effects test calls for "something more," which it described as "'express aiming' at the forum state" *Id.* (citing *Calder*, 465 U.S. at 789.) The court went on to say that "[e]xpress aiming is a concept that in the jurisdictional context hardly defines itself. From the available cases, we deduce that the requirement is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state." *Id.* Seizing on this language, PNS and Williams insist that Facebook has failed to make the requisite showing because it has not produced any evidence demonstrating that either PNS or Williams knew that

Facebook was a resident of California, and to the contrary, the evidence suggests defendants believed that Facebook was a Massachusetts resident.

Ordinarily, and historically, knowledge that a person is located in a particular place has been *intrinsic* to "targeting" or "express aiming." In most cases, if one is ignorant as to where a person is located, it is simply not *possible* to target that person or aim conduct towards him or her. Almost by definition, if conduct has an effect on a person whose location was not known at the time of the acts, the conduct was *not* targeted or aimed at that person.

As the facts of this case demonstrate, however, the technology of the Internet can, in at least some cases, provide a means whereby specific, targeted, conduct may be "expressly aimed" at a particular individual or entity, despite the fact that the person engaging in the conduct may not know the *geographic* location of the individual or entity. To engage in the conduct at issue in this litigation, PNS and Williams needed only Facebook's "virtual" address, not its physical address.

PNS and Williams do not suggest that the facts of this case would preclude personal jurisdiction over them if they had known that Facebook was in California rather than Massachusetts. The mere fact that the Internet provided PNS and Williams a tool by which they could carry out their conduct against Facebook without first making efforts to learn its geographic location is not a reason to excuse them from jurisdiction to which they would otherwise be subject.

Notwithstanding the language in *Bancroft* to which defendants point, the crux of that decision lies in the courts distinction between *untargeted* acts, and those that are purposefully directed at a given plaintiff. "[T]he presence of individualized targeting is what separates [cases finding jurisdiction] from others in which we have found the effects test unsatisfied." *Id.* at 1088. Pointing to one case that failed to meet the effects test, the *Bancroft* court observed that, "there was no showing that the defendants even knew of *the existence* of the plaintiffs, let alone targeted them individually." *Id.* (emphasis added, discussing *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir.1997)).

Here, there is no dispute that PNS and Williams were fully aware that Facebook existed, and that they specifically targeted their conduct against Facebook. That they were able to do so while remaining ignorant of Facebook's precise location may render this case factually distinct from prior precedents finding jurisdiction for acts of express aiming, but not in a manner that warrants a different result.[4]

The conclusion that PNS and Williams are subject to personal jurisdiction under these facts is consistent with cases that have attempted to apply traditional geographically-based precepts of jurisdiction in a world where such borderlines are decreasingly important in many other contexts. For example, as early as 1985 the *Burger King* court held that "in light of the 'inescapable fact of modern life that a substantial amount of business is transacted solely by mail and wire communications across state lines,' the absence of physical contact or presence in the state will not defeat jurisdiction so long as the defendant is deliberately engaged in efforts with the state." *Verizon Online Services, Inc. v. Ralsky*, 203 F.Supp.2d 601, 613 (E.D. Va., 2002) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)). Additionally, many courts have responded to the advent of the Internet and adopted the "sliding scale" test established in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.d. Pa. 1997), which reflects that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the internet.

Facebook also points to *Verizon Online Services, Inc. v. Ralsky*, 203 F.Supp.2d 601 (E.D. VA. 2002) , where jurisdiction over nonresident defendants was premised on allegations that they had transmitted millions of unsolicited emails through Verizon's servers in Virginia, thereby overburdening and causing damage to those servers. The court found that the defendants reasonably should have expected to be haled into court in Virginia for "deliberately exploiting plaintiff's email servers for pecuniary gain while trespassing plaintiff's property." *Id.* at 616. Defendants distinguish the facts of *Ralsky*, arguing there is no allegation here that they sent any emails through Facebook's servers, much less overburdened them. The difference in the precise type of harm, or how it was caused, is of little import. Both here and in *Ralsky*, the argument was that the defendants did not know in *which* forum the servers were located.[5] *See id.* at 619.

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[4] The Internet undoubtedly will continue to present new and challenging issues of personal jurisdiction. This decision does not suggest that a defendant will *always* be subject to personal jurisdiction in *any* or *all* forums that a plaintiff may be located, where the defendant is accused of having used the Internet to "attack" the plaintiff in some manner similar to what allegedly occurred here. For example, it seems less likely that a plaintiff should be able to claim jurisdiction in a particular forum if the plaintiff had used the technology of the Internet to *conceal* its location. Similarly, were a plaintiff to claim presence in a *multitude* of forums based on a wide-flung network of servers, it would raise additional concerns. Moreover, a different situation might be presented where a defendant contended it had no knowledge or reason to believe that the plaintiff was located outside the defendants' forum at all. Any of those fact patterns arguably might undermine any finding of "express aiming."

Although the *Ralsky* court did not expressly analyze the issue that "aiming" ordinarily implies knowledge of where the "target" geographically exists, it firmly rejected the suggestion that defendants could use modern technology to remain ignorant and thus escape jurisdiction. "In this case, Defendants' conduct and connections to Virginia were of their own choosing, not someone else's. Defendants allegedly purposefully transmitted millions of [unsolicited emails] to Verizon's e-mail servers. They cannot seek to escape answering for these actions by simply pleading ignorance as to where these servers were physically located." *Id.*

Under all the circumstances here, PNS and Williams stand in the same position. They may not have had actual knowledge as to Facebook's physical location, but they had sufficient knowledge expressly to aim their conduct at it through the Internet. The effects test, accordingly, is satisfied.

2. "*Arising out of*"

For specific jurisdiction to lie, Facebook must also demonstrate that its claims arise out of the forum-related activities of Williams and PNS. *See Gray & Co.*, 913 F.2d at 760. Based on their argument that they lacked knowledge of Facebook's location, PNS and Williams strongly disagree that their alleged conduct was "forum-related," but they do not seriously dispute that the claims arise directly from that conduct. Facebook's Second Amended Complaint alleges seven claims for relief against PNS and Williams, all of which turn on defendants' alleged acts of gaining unauthorized access to Facebook, misappropriating data from it, and sending unsolicited email to Facebook's users. But for PNS and Williams' alleged acts, Facebook would not have suffered injury in

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[5] The *Ralsky* defendants made the additional argument that their conduct was not targeted at Verizon at all, but at the recipients of the emails, and much of the opinion was addressed to that argument. Here, if anything, defendants have *less* basis to argue that their conduct was not directed at Facebook's servers, even if the servers were not "damaged" in the same manner.

California. *See Panavision International, L.P. v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998) (finding that "but for" defendant's registration of plaintiff's trademark, plaintiff would not have incurred an injury in the forum state). Accordingly, the second requirement for specific jurisdiction is similarly satisfied.

3. *Reasonableness*

Defendants' primary argument directed at the reasonableness prong of the jurisdictional inquiry is that Williams' financial resources are so limited that he will be unable to travel to California for trial. While the prospect that Facebook would pursue its claims against Williams in Washington should jurisdiction be unavailable here is unknown, so long as he is represented by counsel the financial burdens to him of defending this action would likely be much the same in Washington as in this forum. The cost of travel to California for trial, should the matter proceed that far, may be substantial for a person in William's situation, but would only amount to a small fraction of the total costs of defense. Litigating in a geographically-removed forum will always impose *some* additional burdens on the out-of-state parties. Nothing in the facts presented here, however, suggests that those burdens render it unreasonable to exercise jurisdiction otherwise properly arising in these circumstances.

IV. CONCLUSION

For the reasons set forth above, the motion to dismiss of defendants PNS and Williams is denied.

IT IS SO ORDERED.

Dated: August 13, 2007

RICHARD SEEBORG
United States Magistrate Judge